



# Litigation Update

Litigation Section News

July 2005

## **Motions must be supported or opposed by competent evidence.**

It might seem obvious, but, it bears repetition. The court may not grant or deny motions unless the declarations upon which the order is based contain evidence complying with the requirements of the *Evidence Code*. In *Pajaro Valley Water Management Agency v. McGrath* (Cal. App. Sixth Dist.; April 28, 2005) [2005 DJDAR 4915] the Court of Appeal reversed a summary judgment where the relevant portions of the declaration upon which it was based contained hearsay evidence.

## **Denial of anti-SLAPP motion may preclude subsequent summary judgment.**

If a complaint satisfies the requirements of the anti-SLAPP statute (*Code Civ. Proc.* § 425.16), the burden shifts to plaintiff to establish a prima facie case against the moving defendant. The standard for determining whether plaintiff has established a prima facie case is "similar to that applied to determine whether motions or nonsuit, directed verdict or summary judgment should be granted." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851, [107 Cal.Rptr.2d 841, 24 P.3d 493]). Therefore, once the Court of Appeal determined that plaintiff has sufficient evidence to defeat an anti-SLAPP motion, the doctrine of law of the case precluded a subsequent summary judgment

in favor of defendant where the evidence supporting the motion for summary judgment was essentially the same as the evidence presented to demonstrate the existence of a prima facie case in opposition to the anti-SLAPP motion. *Bergman v. Drum* (Cal. App. Second Dist., Div. 3; May 5, 2005) [2005 DJDAR 5194].

## **Court may not refuse to reclassify a case as "unlimited" as long as there is a possibility plaintiff's damages may exceed \$25,000.**

A civil case, where the amount in controversy does not exceed \$25,000, is classified as a "limited" civil case. (*Code Civ. Proc.* § 85 (a).) These are cases that were within the jurisdiction of the Municipal Court before court consolidation and are subject to the "economic litigation" rules. (See, *Code Civ. Proc.* §§ 90 ff.) But where plaintiff claims damages in excess of \$25,000, the court may not reclassify the case as "limited" merely because plaintiff fails to prove to a high level of certainty that damages will exceed that amount; the court may only reclassify the case if there is no possibility that a verdict will exceed that amount. *Ytuarte v. Superior Court* (Cal. App. Second Dist., Div. 7; May 11, 2005) 129 Cal.App.4th 266, [28 Cal.Rptr.3d 474; 2005 DJDAR 5473]; also see, *Walker v. Superior Court* (1991) 53 Cal.3d 257, [807 P.2d 418; 279 Cal.Rptr. 576].

## **Lawyers who successfully established lack of personal jurisdiction over their client may nevertheless sue these clients for fees.**

A law firm succeeded, both in the trial court and on appeal, in having the court quash summons for lack of personal jurisdiction on their out-of-state client. In that suit, the client had been sued for allegedly causing plaintiff's personal injuries. Then the

client did not pay its lawyers and the firm sued it for fees in Los Angeles Superior Court. The former client again responded with a motion to quash; the trial court granted the motion on the basis of the earlier appellate decision determining that the client was not subject to jurisdiction of the California courts. Ironically, the Court of Appeal reversed. Although the court lacked jurisdiction in the earlier case because of defendant's lack of contacts with the state, the present action, based on a contract to retain California lawyers to represent them in a California lawsuit, provided sufficient contacts with the state to satisfy the requirements for specific jurisdiction. *Daar & Newman v. VRL International* (Cal. App. Second Dist., Div. 4; May 16, 2005) 129 Cal.App.4th 482, [28 Cal.Rptr.3d 566; 2005 DJDAR 5641].

## **Validity of contractual ban on class-wide arbitration is still undecided.**

In *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094, [118 Cal.Rptr.2d 862], the Court of Appeal held an arbitration clause prohibiting class-wide arbitration to be unconscionable and unenforceable. The California Supreme Court granted review in two later cases which reached the same conclusion. One of these is *Discover Bank v. Superior Court*, (June 27, 2005, S113725) [2005 Cal. LEXIS 6866] (rev. gr. 4/9/03). But the second case, *Mandel v. Household Bank* (May 18, 2005; S113699) [112 P.3d 1; 29 Cal.Rptr.3d. 1] (rev. gr. 4/9/03) was dismissed, after the parties settled the case. The First Appellate District recently weighed in on the question in holding that such a clause is not unconscionable and is therefore enforceable. *Parrish v. Cingular Wireless, LLC*. (Cal. App. First Dist., Div. 5; May 18, 2005) 129 Cal.App.4th 601, [\_\_\_\_ Cal.Rptr. \_\_\_\_; 2005 DJDAR 5728] (as mod. June 17, 2005). So, at this time,

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the only two citable cases reached opposite results.

**California ethics rules for arbitrators do not apply to arbitrators appointed pursuant to the rules of the National Association of Securities Dealers.** In 2001 California adopted *Code Civ. Proc.* § 1281.85 which empowered the Judicial Council to impose various disclosure and ethics requirements on neutral arbitrators. Our Supreme Court has now decided that the provisions of the statute are preempted by the federal *Securities Exchange Act* (15 U.S.C. § 78a *et seq.*). Pursuant to that act, the Securities and Exchange Commission approved ethical standards for members of the National Association of Securities Dealers ("NASD"). These ethical standards, rather than the California standards, govern arbitrations administered by NASD. *Jevne v. Superior Court* (Cal.Supr.Ct.; May 23, 2005) 35 Cal.4th 935, [28 Cal.Rptr.3d 685; 2005 DJDAR 5965].

### Participate In The Discussion Board Excitement

See what all the excitement is about! We are having great participation on our State Bar Litigation Section Bulletin Board. Join in on the exciting discussions and post your own issues for discussion.

If you have any comments, ideas, or criticisms about any of the new cases in this month's issue of Litigation Update, please share them with other members on our website's discussion board.

Our Board is quickly becoming "The Place" for litigators to air issues all of us are dealing with.

Go to:

<http://members.calbar.ca.gov/mb/howForum.aspx?ForumID=13> to explore the new bulletin board feature—just another benefit of Litigation Section membership.

**Remember to first fill out the Member Profile to get to the Discussion Board!**

**The judge who hears the evidence in a case should determine whether sanctions are appropriate.** Unless unavailable, only the judge who heard the evidence in a case may determine whether a party acted in bad faith and was thus subject to sanctions. *Orange County Dept. of Child Support Service v. Superior Court* (Cal. App. Fourth Dist., Div. 3; May 23, 2005) 129 Cal.App.4th 798, [2005 DJDAR 5984].

**Client may waive right to receive notice of right to arbitrate a fee dispute.** The *Mandatory Fee Arbitration Act* (*Bus. & Prof. Code* § 6200 *et seq.*) requires lawyers to give their clients written notice of their right to arbitrate at or before serving a suit for fees. Where the lawyers fail to do so, the court has discretion (but not a mandatory duty) to dismiss the suit. *Richards, Watson & Gershon v. King* (1995) 39 Cal.App.4th 1176, [46 Cal.Rptr.2d 169]. But, even though the client raised the failure to give notice in his answer, the client's failure to initiate the arbitration and continue defending the suit in superior court resulted in a waiver of his right to arbitration under the statute. *Law Offices of Dixon R. Howell v. Valley* (Cal. App. Sixth Dist.; May 27, 2005) 129 Cal.App.4th 1076, [2005 DJDAR 6194].

### California has jurisdiction in suit against Las Vegas hotel.

The California Supreme Court has held, in a class action against a Harrah's hotel in Las Vegas, that California courts have in personam jurisdiction over Harrah's, a Nevada resident. The trial court had dismissed the action for lack of jurisdiction. The Court of Appeal reversed and the Supreme Court affirmed the decision of the Court of Appeal, holding that Harrah's had sufficient minimum contacts with California to justify the exercise of jurisdiction. Harrah's maintained an interactive website permitting California residents to make reservations and engages in advertising and promotional activities in the state. *Snowney v. Harrah's Entertainment, Inc.* (Cal.Supr.Ct.; June 6, 2005) 35 Cal.4th 1054, [2005 DJDAR 6517].

**Note:** The case contains a valuable discussion of the circumstances under which the maintenance of a web-site subjects a party to jurisdiction in the California courts. On this subject, also see Weil & Brown, *Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2004) ¶¶ 3:239.6 ff. and Schwarzer, Tashima & Wagstaffe, *Cal. Practice Guide: Federal Civil Procedure Before Trial* (The Rutter Group 2004) Chapter 3.

### Evaluation of New Civil Jury Instructions:

The Jury Instruction Committee is actively involved in reviewing, and recommending changes to, the new California Civil Jury Instructions. VerdictSearch, a division of American Lawyers Media, is assisting in the solicitation of input and feedback from practicing attorneys who have recently tried cases in California.

If you are interested in reporting on a recent trial in California and providing your feedback on the new CACI jury instructions, [click here](#).

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Tom Pye (415) 538-2042  
[Thomas.pye@calbar.ca.gov](mailto:Thomas.pye@calbar.ca.gov)

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